Mahmud Jamili bin Zaudin & Anor v Public Prosecutor

HIGH COURT (KANGAR) — CRIMINAL APPEAL NOS 42-8-94, 42-9-94, 42-10-94
ALAUDDIN J
25 JULY 1995

Evidence *— Accomplice — Corroboration — Whether another accomplice could provide sufficient corroboration*

Criminal Procedure *— Defence — Alibi — Burden of proof — Applicable test — 'Reasonable doubt' or 'balance of probabilites'*

The appellants were convicted for the offence of accepting and soliciting a gratification contrary to the Prevention of Corruption Act 1961. They now appealed against the conviction on the grounds that the learned sessions judge had not adequately and properly considered the question of corroboration of accomplices' evidence and the defence of alibi and had not applied the correct test in respect of the burden of proof of the defence.

Held, allowing the appeals:

(1) The evidence of an accomplice needed corroboration and such corroborative evidence had to come from independent sources. An accomplice was incapable of corroborating the evidence of another accomplice.

(2) As regards the defence of alibi, all that an accused needed to do was to raise a reasonable doubt that he was the person at the scene of the crime.

[Bahasa Malaysia summary

Perayu telah disabit atas kesalahan menerima dan meminta suapan menyalahi Akta Pecegahan Rasuah 1961. Mereka sekarang merayu terhadap sabitan itu atas alasan bahawa hakim sesyen telah tidak mempertimbangkan secukupnya dan sepatutnya soalan sokongan keterangan rakan sejenayah dan pembelaan alibi dan telah tidak memakai ujian yang betul berkenaan dengan beban pembuktian yang terletak pada pihak pembela.

Diputuskan, membenarkan rayuan itu:

(1) Keterangan seorang rakan sejenayah memerlukan sokongan dan keterangan sokongan sedemikian mesti datang daripada sumber-sumber yang bebas. Seorang rakan sejenayah tidak berupaya menyokong keterangan rakan sejenayah yang lain.

(2) Berkenaan dengan pembelaan alibi, apa yang perlu dilakukan oleh seorang si tertuduh adalah untuk menimbulkan keraguan

yang munasabah bahawa beliau adalah orang di tempat kejadian kesalahan itu.]

Notes

For cases on corroboration, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 526–620; [1994] *Mallal's Digest* paras 1293–1299.

For cases on defence, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 118–1136; [1994] *Mallal's Digest* para 1051.

Cases referred to

Illian & Anor v PP [1988] 1 MLJ 421 (folld)
Liow Siow Long v PP [1970] 1 MLJ 40 (refd)
Mohamed Ali v PP [1962] MLJ 230 (refd)
PP v Lim Chen Len [1981] 2 MLJ 41 (refd)
Ramachandran v PP [1972] 2 MLJ 183 (refd)
Vasan Singh v PP [1989] 2 CLJ 402 (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144 (folld)

Legislation referred to

Prevention of Corruption Act 1961 ss 3(A)(ii), 4(a)
Criminal Procedure Code (FMS Cap 6) s 402

CV Prabhakaran (*Praba & Associates*) for the appellants.
Razif (Deputy Public Prosecutor) for the respondent.

Alauddin J: On 30 May 1994, both appellants were convicted for offences under the Prevention of Corruption Act 1961 (the Act) at the sessions court Kangar. The first appellant, in Case No 61–1–89 was convicted for an offence of accepting a gratification to wit RM100, an offence under s 4(a) of the Act and punishable under s 4 and was sentenced to four months' imprisonment and a fine of RM1,000 in default two months imprisonment. In Case No 61–2–89 he was convicted for an offence of corruptly soliciting a gratification to wit RM400, an offence under s 3(a)(ii) of the Act and punishable under s 3 of the same Act. He faced a similar sentence as the first offence. As for the second appellant, he was convicted for an offence under s 4 (a) of the Act, ie abetment of an offence of corruptly accepting a gratification and faced a similar sentence.

Both the appellants have now appealed against their conviction and sentence.

Before me, the conviction was attacked on the following grounds:

(a) The learned sessions judge misdirected herself on facts and law when after having held that PW2 and PW3 were accomplices she applied the wrong test for corroborative evidence. She considered evidence which were not corroborative as corroborative evidence.

(b) The learned sessions judge misdirected herself on facts and law when she failed to take into consideration that there were material contradictions in the evidence of both PW2 and PW3 and that their evidence were unreliable.

(c) Having called for the defence the learned sessions judge did not adequately consider the defence of alibi and drew inferences which were against the weight of evidence.

(d) Further, the learned sessions judge did not adequately consider the burden of proof in respect of the defence in that it only requires a reasonable doubt to be raised. The learned sessions judge did not direct her mind to this burden and had completely omitted to do so.

Looking at the grounds of appeal and having heard submissions from both sides, I am of the view that there really are only two important issues which have to be considered in these appeals namely:

(i) Whether the learned sessions judge had adequately and properly considered the question of corroboration of accomplices' evidence.

(ii) Whether the learned sessions judge had adequately considered the defence of alibi and applied the correct test in respect of the burden of proof for the defence.

I shall first consider the issue of corroboration of accomplice's evidence. However, I do not propose to discuss the facts of the case in detail. Suffice for me to mention them as and when they are relevant.

From the notes of evidence and the judgment of the learned sessions judge it is abundantly clear to me that the whole of the case for the prosecution was based on the evidence of PW2 and PW3. From her grounds of judgment, it becomes even clearer to me that the learned sessions judge had made a finding of fact that both PW2 and PW3 were accomplices.

At p 163 of the appeal record her judgment reads:

> Mahkamah mengambil iktibar bahawa SP3 (tuan punya lembu) adalah seorang rakan jenayah 'accomplice' dengan Mahmud dalam hal memberi dan menerima rasuah berhubungan kes ini. Mahkamah amat berhati-hati dalam meneliti keterangannya takut kalau-kalau keterangannya menyebabkan penganiayaan ke atas tertuduh-tertuduh dalam kes ini.

Again in her judgment at p 171 of the appeal record, she says:

> Seperti yang telah dihuraikan tadi Mahkamah bergantung di atas keterangan SP2, SP3, keterangan bebas dan keadaan sekeliling kes. SP3 adalah rakan jenayah kepada Mahmud dan SP2 adalah rakan jenayah SP3 kerana mereka sama-sama terlibat mengurus lembu seludup kepunyaan SP3.

It is trite law that the evidence of an accomplice needs corroboration and such corroborative evidence must come from independent sources. There is no dearth of authorities on this point.

Having found that both PW2 and PW3 were accomplices it is encumbant upon the learned sessions judge to look for corroborative evidence. Let us now examine what the learned sessions judge had to say regarding this. At p 172 of the appeal record the learned sessions judge in her judgment says:

> Mahkamah berpuas hati bahawa dalam hal-hal yang disebut di atas keterangan SP2 menyokong keterangan SP3. Selain dari itu terdapat keterangan SP4 yang menyokong.

With the greatest of respect to the learned sessions judge, I am of the view that she had completely misdirected herself on this point as it is also trite law that an accomplice is incapable of corroborating the evidence of another accomplice. (See *Ramachandran v PP* [1972] 2 MLJ 183.)

Turning to the evidence of PW4 (wife of PW2), apart from saying that there were two motorcycles at her house that night she did not know what actually transpired at her house. She did not know who came with the motorcycles. She was not able to identify them. As a matter of fact what she said in evidence was what the husband (PW2) told her. At p 75 of the appeal record this is what PW4 said in her evidence under cross-examination:

> Semasa suami saya buka pintu dan keluar saya tidak ikut. Saya tidak kenal Zul. Bila suami saya balik dan sebut nama Zul baru saya tahu. Malam itu saya tidak tahu siapa yang 3 orang itu sehingga suami saya sebut nama Zul. Cerita polis hendak tangkap lembu diberitahu olih suami saya.

This is the evidence of PW4 which the learned sessions judge had accepted as corroborative of the evidence of PW2. To my mind this certainly is not an independent evidence which could be regarded as corroborative of the evidence of PW2. There ought to be some other corroborative evidence. (See *Mohamed Ali v PP* [1962] MLJ 230.)

The learned sessions judge in her judgment at p 172 of the appeal record had also considered what was written in the station diary at Beseri Police Station as corroborative evidence. This is what she said:

> Mengikut stesyen dairi Balai Polis Beseri pada jam 11.01 malam memang Koperal Zul keluar bersama Mahmud dan seorang lagi dan balik ke stesyen selepas jam 12.30 pagi seterusnya. Tidak mungkin seorang awam lebih-lebih lagi seorang kampung berbohong tentang hal ini jika apa yang diberitahu Mahkamah menepati apa yang tercatit dalam stesyen dairi Balai Polis dimana ketiga-tiga tertuduh bertugas. Perkara ini merupakan keterangan bebas yang menyokong bahawa keterangan SP2 adalah benar. Keterangan SP2 saling menyokong keterangan SP3.

However, the learned sessions judge failed to realize that PW2 had said in evidence that the appellants came to his house at 11pm. (see p 54 of the appeal record). This is in direct contradiction with what was written in the station diary. As a matter of fact PW8 in his evidence confirmed that at 11pm. on the relevant date the appellants were at the police

station. In his evidence at p 86 of the appeal record, PW8 had this to say:

> Pada waktu saya jumpa ketiga-tiga Orang Kena Tuduh memakai uniform yang lengkap. Koperal Zul maklum pada saya ia akan tulis stesyen dairi. Selepas tulis ketiga-tiga Orang Kena Tuduh ada di balai sehingga pukul 11.20 atau 11.25. Lebih kurang 11.25 mereka bertolak dari balai polis dengan motosikal.

It is regrettable that the learned sessions judge had failed to consider this part of the evidence. In failing to do so she had once again fallen into the error of misdirecting herself in that she had accepted as corroborative evidence which are not corroborative.

It is pertinent at this point of time to mention that although the time as specified in the charge reads 12 midnight, there is no evidence whatsoever to suggest that the offence actually occurred at that time.

It will also not be out of place for me to mention at this stage that I was baffled by the learned deputy public prosecutor's submission before me when he said that it was wrong for the learned sessions judge to have considered PW2 and PW3 as accomplices. For reasons best known to him the learned deputy public prosecutor strenuously urged upon me to disregard or rather disagree with this finding of fact by the learned sessions judge. With the deepest respect I find it difficult to accept the learned deputy public prosecutor's submission as I find that there is ample evidence for the learned sessions judge to have come to that finding of fact. There is no doubt whatsoever in my mind that the learned sessions judge was right in holding that both PW2 and PW3 were accomplices. What was wrong was that she had accepted as corroborative evidence which were not corroborative although she had warned herself of the danger of convicting upon the uncorroborated evidence of an accomplice.

As I have said earlier the prosecution relied entirely on the evidence of PW2 and PW3. As the learned sessions judge had considered them to be accomplices their evidence needed corroboration. From the whole of the evidence for the prosecution I cannot see any corroboration whatsoever. Even if the learned sessions judge had not considered PW2 as an accomplice, I am still of the view that he is an interested witness and as such his evidence also needs corroboration. (See *Liow Siow Long v PP* [1970] 1 MLJ 40.)

Further, I find that the evidence of witnesses for the prosecution is not credible. For example, PW2, in his examination-in-chief had said that the first appellant demanded RM200 from PW3. Subsequently, under cross-examination when he was attacked he said that in his statement he had mentioned that the first appellant had asked for RM400 but said this was told to him by PW3. However upon further cross-examination he changed his evidence again.

On this premise the learned sessions judge should have scrutinized his evidence very carefully as his credit worthiness was at stake. Although

the learned sessions judge had decided that this contradiction raised by PW2 is reconcilable, I find that her finding of fact is certainly against the weight of evidence more so here when she had considered PW2 as an accomplice. An accomplice's evidence should be treated with the greatest caution. A

Based on these evidence alone I must say, in all humility that the prosecution had failed to establish a prima facie case and it was wrong for the learned sessions judge to have called for the defence. B

Having called for the defence did the learned sessions judge apply the correct test in considering the burden of proof by the defence? This brings me to the next important issue in this appeal. C

The appellants' defence is one of alibi. The evidence of the prosecution witnesses supports this alibi. PW8, PC Zaini, had stated in evidence that both the appellants were at the Police Station Beseri at 11pm on 9 June 1988. The second appellant entered this in the station diary (P5). Apart from this, both the appellants had written in their pocket books (P8 and P9) that they commenced duty at 11pm. PW8 had also given evidence that both the appellants remained in the police station till 11.25pm on 9 June 1988. The evidence of PW2 that the appellants were at his house at 11pm on 9 June 1988 is therefore in doubt, because at that time the appellants were in the police station. This fact is confirmed by exhibits P5, P8, P9 and the testimony of PW8. D E

In their defence the appellants had given evidence that they went to various places and at 12 midnight they were at the junction of Kampong Santan. DW3 and DW4 confirmed in their evidence that they saw both appellants at Kampong Santan at 12 midnight. Both DW3 and DW4 stayed on and spoke to the second appellant till 12.20am. Thereafter they left for their respective houses in Kampong Santan. I had meticulously reviewed their evidence from the record of appeal and I find that they had been subjected to severe cross-examination by the prosecution. Nevertheless, I am of the view that their evidence had not been shaken. F G

The charge against the appellants was that on 9 June 1988 at 12 midnight they were at Kampong Padang Pauh (PW3's house). Can this be possible in view of the evidence of DW3 and DW4. I could see from the evidence that it was put by the prosecution to DW3 and DW4 that they were there at 12.30am on 10 June 1988. However, the prosecution had failed to call any evidence in rebuttal to contradict the alibi which is very important to the appellant's defence. Due notice under s 402 CPC was served on the deputy public prosecutor together with the names and addresses of the two witnesses who came to court. H

In his submission before me the learned deputy public prosecutor had disputed the proper service of the notice under s 402 CPC. According to him it was a mistake on the part of the learned sessions judge to have allowed the defence of alibi to be produced. In support of this submission he referred to the cases of *PP v Lim Chen Len* [1981] I

2 MLJ 41 and *Vasan Singh v PP* [1989] 2 CLJ 402. However, learned counsel for the appellants had successfully explained to the court that the notice was properly given by producing the AR Card. To this the learned DPP had no reply. The matter was thus put to rest. It therefore remains that the notice under s 402 CPC was properly given by the defence.

Having heard the defence of both appellants this is what the learned sessions judge had to say at p 177 of the appeal record:

> Mahkamah mendapati Mahmud dan Zul gagal mengemukakan pembelaan-pembelaan yang apabila dipertimbangkan mengguna rumusan imbangan kebarangkalian (on a balance of probabilities) dapat menimbulkan keraguan atas andaian bahawa Mahmud telah memujuk rayu SP3 untuk mendapatkan wang rasuah sebanyak RM400 dan menerima RM100 wang rasuah daripadanya dan bahawa Zul terlibat kerana bersubahat dengan Mahmud atas kesalahan menerima wang rasuah sebanyak RM100 itu daripada SP3.

In the case of *Illian & Anor v PP* [1988] 1 MLJ 421 the then Supreme Court held that as regards the defence of alibi, all that an accused person need to do is to raise a reasonable doubt that he was the person at the scene of the crime. The proper approach is for the learned trial judge to consider at the close of the defence case whether he had indeed succeeded in doing so. Since in this case the learned trial judge may have applied the heavier burden, then he had misdirected himself.

Throughout her judgment nowhere had the learned sessions judge mentioned that she had directed her mind to the proper test in the defence of alibi. From that part of her judgment which I have quoted earlier, I have no doubt that she had completely misdirected herself by applying the wrong test, ie on a balance of probability. I am unable to say whether the learned sessions judge would have found the appellants guilty had she rightly directed herself on this important issue of law. But as I have said earlier there is a clear misdirection on her part. It is also a misdirection on the part of the learned sessions judge when she said that the defence of both appellants was a mere denial.

In so far as the second appellant is concerned he was charged for abetment. The only evidence adduced by the prosecution against him was that he went to PW2's house. He did not go to PW3's house. The sum of RM100 was alleged to have been paid to the first appellant. Nothing was paid to the second appellant. Only the first appellant went to PW3's house. There was no other evidence against the second appellant. Under these circumstances, the learned sessions judge nevertheless invoked the provision of s 14 of the Act against him.

At p 122 of the appeal record her judgment reads:

> Mahkamah berpuas hati bahawa Koperal Zul bersubahat kerana sekembalinya Mahmud daripada rumah SP3 dengan wang yang diterima daripada SP3 Koperal Zul selaku ketua pasukan dan seorang lagi telah beredar tanpa menangkap lembu-lembu seludup kepunyaan SP3 yang dipelihara oleh SP2.

Later at p 177 she says:

> Atas rumusan imbangan kebarangkalian Mahmud dan Zul gagal menunjukkan kepada Mahkamah bahawa apa yang mereka ceritakan itu mungkin benar. Atas dasar-dasar ini Mahkamah mendapati mereka gagal memenuhi kehendak seksyen 14 APR.

From this part of her judgment it is obvious to me that the learned sessions judge had once again misdirected herself. It is for this reason I suppose that the learned deputy public prosecutor in his submission before me suggested that the matter of conviction of the second appellant be left to the court as probably he found it difficult to support such conviction (see *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144).

The cumulative effect of the various errors in the judgment of the learned sessions judge was that there has been a failure of justice and in the circumstances the appeals should be allowed and the conviction and sentence set aside.

Appeals allowed.

Reported by Victor T Gidwani